STATE OF MICHIGAN

COURT OF APPEALS

DIRKJE METHORST,

Plaintiff-Appellee,

v

LEO VERKERK,

Defendant-Appellant,

and

NEWAYGO COUNTY FRIEND OF THE COURT,

Amicus Curiae.

UNPUBLISHED
April 24, 2014

No. 307073
Newaygo Circuit Court
LC No. 07-007628-UN

Before: SAWYER, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

In this action to enforce support orders that were originally entered in the Netherlands, a prior panel of this Court reversed and remanded the circuit court's order enforcing the support orders on the ground that the circuit court lacked jurisdiction. On remand, the circuit court determined, based on certain facts that had not been presented to this Court in the first appeal, that it had jurisdiction to hear the case. This case is now before us on leave granted. We affirm the circuit court's decisions that jurisdiction was proper and that defendant's challenges to the support orders are meritless.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff, Dirkje Methorst, and defendant, Leo Verkerk, were married and divorced in the Netherlands. In 1992, following the divorce, defendant immigrated to the United States. Approximately 15 years later, plaintiff filed an affidavit with the Newaygo County Friend of the Court (FOC), alleging that defendant owed unpaid alimony and child support. Thereafter, the circuit court ordered defendant to pay an outstanding balance of more than $160,000. In our previous opinion, *Methorst v Verkerk*, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2011 (Docket No. 294770) (*Methorst I*), 1-3, we set forth the pertinent facts in this case as follows:

On August 22, 2007, the Newaygo FOC submitted to the Newaygo Circuit Court an "Interstate Request Form" that sought a new docket number for an action under the Uniform Interstate Family Support Act, MCL 552.1101 *et seq.* (UIFSA). On the same day, the FOC filed with the circuit court a partially typed, partially handwritten document entitled, "Registration Statement," which identified Methorst as the "petitioner." A number of pages accompanied the form, including copies of photos of Verkerk, a "sworn statement of arrears concerning the case Verkerk—Methorst," and an excerpt of a Dutch statute, provided mostly in Dutch. The "sworn statement of arrears" consists of equations representing yearly alimony and child support amounts due; however, the documents do not reference the source of the information used to calculate the arrearages. Conspicuously absent from the packet of documents is a copy of a judicial order or judgment. Although the circuit court's register of actions denotes a "final order or judgment filed" on August 22, 2007, none was attached to the documents filed with the circuit court on August 22, 2007, and the record nowhere else contains any Dutch order or judgment.

On December 17, 2007, the FOC petitioned the circuit court for an order to show cause why it should not hold Verkerk in contempt for failing to pay outstanding child support of $162,105.16. The FOC derived this figure from the calculations supplied by Methorst, which appear in Euros rather than United States dollars. The record reveals no indication of the manner in which the FOC converted the value of Methorst's claim from Euros to dollars. Nor does the record contain a circuit court order registering a Dutch support order. On December 31, 2007, the circuit court granted the FOC's order to show cause and demanded that Verkerk appear before a referee in January 2008. According to an order entered on February 4, 2008, the referee adjourned the show cause hearing to April 2008 for the following reason:

> Friend of the Court is to contact the initiating country, in writing, to request any information regarding possible Social Security benefits that the children of this case may have received on behalf of the Defendant, and to inquire if the Defendant should receive any credit towards his arrears for these payments.

The next entry in the circuit court record consists of an order issuing a bench warrant for Verkerk's arrest on the basis of his failure to appear at the April 2008 hearing. Subsequently, Verkerk was arrested, and on May 12, 2008, the circuit court sentenced him to 45 days in jail, "to be released upon payment of $1,326.25" to the FOC. Verkerk paid the identified sum and made two installment payments toward the arrearage claimed in Methort's [sic] affidavit. On September 23, 2008, the circuit court entered another show cause order compelling Verkerk to attend an October 2008 hearing before a FOC referee. Verkerk appeared on the hearing date and requested counsel. The referee appointed an attorney to represent Verkerk and continued the hearing to the next day. At the hearing, Verkerk's counsel asserted that Verkerk contested the amount of the arrearage. The referee found Verkerk in contempt for neglecting to

make the payments ordered by the circuit court, ordered 90 days in jail, but allowed for suspension of the sentence if defendant made several of the missed payments. The circuit court adopted the referee's recommendations.

Once again, Verkerk did not make the ordered payments, and in April 2009, the circuit court entered another show cause order. Verkerk retained counsel, who filed a response challenging the circuit court orders as barred by the Uniform Foreign Country Money Judgments Recognition Act (UFCMJRA), MCL 691.1131 *et seq*. Verkerk further asserted that the doctrine of laches should preclude Methorst's claims. At a hearing in April 2009, the referee rejected Verkerk's positions, and he sought review in the circuit court. In May 2009, the circuit court entered a written order finding that

> the principles of comity and res judicata mandate that the child and spousal support obligations created in The Netherlands' court be enforced. *Dart v Dart*, 460 Mich 573[; 597 NW2d 82] (1999). Also, I agree with the Referee's conclusion that the defendant did not present any facts or circumstances which would bar the enforcement of these obligations based on the equitable doctrine defense of laches.

The circuit court affirmed the referee's order and remanded the matter to the referee for consideration of Verkerk's request to modify the order in light of his recent heart attack. The circuit court also permitted Verkerk to raise additional legal challenges to the court's orders. In October 2009, the referee rejected the additional arguments raised by defendant, including his defenses relating to periods of limitation, which the circuit court thereafter rejected also. This Court granted Verkerk's application for leave to appeal. *Methorst v Verkerk*, unpublished order of the Court of Appeals, entered February 23, 2010 (Docket No. 294770). [Footnotes omitted).]

In *Methorst I*, unpub op at 3-6, the panel declined to address the merits of defendant's claim because it found that the circuit court lacked jurisdiction over him. The panel's decision was premised on a finding that the circuit court record did not contain a copy of support orders entered in the Netherlands, an order registering the support order, or a record of the Netherlands proceedings. *Id.* at 5-6. Based on its finding that the circuit court lacked jurisdiction, the panel "[r]eversed and remanded for further proceedings consistent with this opinion." *Id.* at 6.

Following this Court's remand, defendant moved for summary disposition, arguing that "[a]ny further efforts to compel the Defendant to pay child support or alimony would be contrary to [this Court's] [o]pinion and inconsistent with it." Defendant argued, consistent with this Court's findings in *Methorst I*, that the circuit court record was void of an order registering the Netherlands' judgment of divorce and support orders. Defendant argued that this problem was never cured, and therefore, the proceedings should be terminated.

At a July 11, 2011 hearing, the FOC argued that the procedural defects cited by this Court did not exist and that the documents referenced in this Court's opinion had been inadvertently left out of the circuit court record. The FOC argued that both parties possessed the pertinent

documents throughout the proceedings and opined that a clerical error prevented the circuit court record from containing the documents. Furthermore, the FOC proceeded to produce the Netherlands support order, a sworn statement from the Netherlands Central Agency for Maintenance and Support indicating the amount of defendant's arrearages, and the registration statement, dated October 15, 2007, upon which the FOC relied when it began the enforcement proceedings against defendant.

At the close of the hearing, the FOC requested an order declaring that the circuit court always had jurisdiction in this case, and that the FOC should not be required to dismiss the action and file a new one. The circuit court granted the FOC's request, noting:

> It turns out that basically all of these things were present, including the Certified Judgment from the beginning. And the Court would note that there were some significant proceedings before [defendant] even raised this issue. There were enforcement proceedings, there were payments on this account, and the – it was never argued or contested that this case was improperly started.
>
> The Court would note that through these proceedings some of these documents were referred to, so it should not be any surprise to the Respondent that these problems – that these documents were in issue.
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> * * *
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> So basically what I would do, [counsel for the FOC], I would grant the relief that you requested; you would need to do an Order, and then this matter can go up to the Court of Appeals.

On October 24, 2011, the circuit court entered an order denying defendant's motion for summary disposition "for the reasons set forth on the record." The order also concluded that "[t]he defects that led to remand by the Court of Appeals decision of March 17, 2011, have been corrected, based on the Court's findings as set forth on the record."

On November 14, 2011, defendant filed an application for leave to appeal the circuit court's order. On April 8, 2013, this Court granted the application, "limited to the issues raised in the application, as well as whether the trial court violated the law of the case doctrine by not dismissing the enforcement action for lack of subject-matter jurisdiction." *Methorst v Verkerk*, unpublished order of the Court of Appeals, entered April 8, 2013 (Docket No. 307073).

II. LAW OF THE CASE DOCTRINE

"Whether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007). "The law of the case doctrine provides that a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case where the facts remain materially the same." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010) (quotation omitted). "The rationale behind the doctrine includes the need for finality of judgments and the lack of jurisdiction of an appellate court to modify its judgments except on rehearing." *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595

(2002). "The law-of-the-case doctrine applies without regard to the correctness of the prior determination, and this Court is bound by the decision on a question of law made by a panel of this court in the first appeal." *Augustine v Allstate Ins Co*, 292 Mich App 408, 428; 807 NW2d 77 (2011) (quotation omitted).

"The law of the case doctrine has been described as discretionary—as a general practice by the courts to avoid inconsistent judgments—as opposed to a limit on the power of the courts." *Duncan v Michigan*, 300 Mich App 176, 189; 832 NW2d 781 (2013).[1] However, cases that describe the doctrine as a discretionary practice "also acknowledge this Court's mandatory obligation to apply the doctrine when there has been no material change in the facts or intervening change in the law." *Id.* Where the facts of the case do not remain materially or substantially the same, or if there has been a change in the law, the doctrine does not apply. *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

We begin our analysis of this matter by examining the holdings of the prior decision, *Methorst I*. In that case, the panel noted that the circuit court file lacked a copy of any support order entered in the Netherlands. *Methorst I*, unpub op at 3, 5. The panel found that the circuit court "did not possess jurisdiction under the UIFSA to enforce child and spousal support orders against [defendant.]" *Id.* at 5. The panel also found that the circuit court "erred by exercising jurisdiction" over the matter under the principles of international comity and res judicata because there was no record of the Netherlands proceedings. *Id.* at 6.[2]

Thus, in our prior decision, this Court found that, because the circuit court record was void of the support order or any record of the Netherlands proceedings: (1) the circuit court lacked jurisdiction under the UIFSA; and (2) the circuit court erred by exercising jurisdiction under the principles of international comity and res judicata. Subsequent to the panel's decision in *Methorst I*, the FOC produced, on remand, the Netherlands support order and the other

[1] "The doctrine exists primarily to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Grievance Admin v Lopatin*, 462 Mich 235, 260 n 26; 612 NW2d 120 (2000) (quotations omitted).

[2] Elsewhere in the panel's opinion, the panel opined that the circuit court "lacked subject-matter jurisdiction to enforce any support orders against [defendant]" because it lacked any record of the support order in this case. *Methorst I*, unpub op at 3. Based on the context of the panel's opinion, we find that the use of the term "subject-matter jurisdiction" was inadvertent. Indeed, the context of the panel's opinion shows that the panel found the circuit court erroneously exercised its jurisdiction, not that it did not possess jurisdiction over the subject matter of this case. See *id.* at 4-6. See also *Altman v Nelson*, 197 Mich App 467, 472-473; 495 NW2d 826 (1992) (explaining the difference between a lack of subject matter jurisdiction and the erroneous exercise of jurisdiction). We also note that at oral argument, defendant's counsel conceded that subject matter jurisdiction was not an issue in this case.

documents identified by this Court as lacking in *Methorst I*.[3] As such, the FOC cured the defects identified by this Court in *Methorst I*.[4] For this reason, we find that "[t]he law of the case does not apply here because the facts did not remain materially the same." *South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647, 655; 625 NW2d 40 (2000). Indeed, the basis for the prior panel's decision was that the very documents now produced by the FOC were missing from the record. As such, we find that the circuit court did not violate the law of the case doctrine by not dismissing the enforcement action.

III. STATUTE OF LIMITATIONS

Turning now to the issues in defendant's brief, defendant argues that plaintiff's claims for support are untimely and that they are barred by the statute of limitations. "Whether a claim is barred by a statute of limitations is a question of law that this Court reviews de novo." *Scherer v Hellstrom*, 270 Mich App 458, 461; 716 NW2d 307 (2006). There is some dispute as to the applicable limitations period in this case. For the reasons discussed *infra*, regardless of the length of the applicable limitations period, we find that defendant cannot prevail on his statute of limitations argument.

A. WAIVER OF STATUTE OF LIMITATIONS DEFENSE

The circuit court found that, pursuant to MCR 2.111(F), defendant waived his statute of limitations defense.

MCR 2.111(F) sets forth the general rules of pleading. MCR 2.111(F)(3) provides, in pertinent part, that "[a]ffirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended . . . ." MCR 2.111(F)(2) provides, in pertinent part, that "[a] defense not asserted in the responsive pleading or by motion as provided by these rules is waived . . . ."). See also *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 319; 503 NW2d 758 (1993) (emphasis in original) ("Under MCR 2.111(F)(2) . . . a defense is waived if not pleaded *or* raised by motion."). The statute of limitations is an affirmative defense subject to the pleading requirements found in MCR 2.111(F). MCR 2.111(F)(3)(a); *Walters v Nadell*, 481 Mich 377, 389; 751 NW2d 431 (2008).

The waiver rule set forth in MCR 2.111(F)(2) applies to pleadings. "[O]nly complaints, third-party complaints, cross-claims, counterclaims, answers, and replies to answers are pleadings." *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243, 255; 805 NW2d 217 (2011), citing MCR 2.110(A). Further, a responsive pleading is required only in response to:

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[3] It appears these documents may have been filed with the circuit court from the outset, and it is unclear why they were not included in the circuit court file at the time of the panel's decision in *Methorst I*.

[4] Defendant does not challenge this conclusion and admitted at oral argument, "I don't have any procedural argument on appeal."

(1) a complaint,

(2) a counterclaim,

(3) a cross-claim,

(4) a third-party complaint, or

(5) an answer demanding a reply. [MCR 2.110(B).]

In the case at bar, defendant first raised his statute of limitations defense in a May 14, 2009 Supplemental Memorandum. Prior to the filing of that memorandum, the record reveals that defendant had never been served with a pleading, as defined by MCR 2.110(A). Thus, no responsive pleading was required before that time. See MCR 2.110(B). Additionally, before defendant filed his supplemental memorandum in which he raised his statute of limitations defense, he had never filed anything that qualifies as a responsive pleading. Consequently, the circuit court erred when it found that defendant waived his statute of limitations defense under MCR 2.111(F). See *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App at 255-256 (explaining that the waiver rule in MCR 2.111(F) only applies to matters that fall within the exclusive definition of "pleadings").

Nevertheless, although the circuit court's reasoning as to why defendant waived his statute of limitations defense was incorrect, its ultimate conclusion as to waiver was not erroneous because defendant waived the defense under the UIFSA. MCR 3.214(A) provides, in pertinent part, that "[a]ctions under the . . . Uniform Interstate Family Support Act (UIFSA), MCL 552.1101 *et seq.* . . . are governed by the rules applicable to other civil actions, *except as otherwise provided by those acts* and this rule." (Emphasis added). Under the UIFSA, after a registered support order has been confirmed, a party is precluded from "further contest of the order with respect to a matter that could have been asserted at the time of registration." MCL 552.1625(3). Among the defenses to a support order expressly listed in MCL 552.1625 is a statute of limitations defense. See MCL 552.1625(1)(g).

Waiver of a defense under the UIFSA only applies after a registered support order has been confirmed. MCL 552.1625(3). The procedures for confirming and contesting a registered support order under the UIFSA are set forth in MCL 552.1623(1-2):

> (1) A nonregistering party seeking to contest the validity or enforcement of a registered order in this state shall request a hearing within 20 days after the date of mailing or personal service of notice of the registration. The nonregistering party may seek to vacate the registration, to assert a defense to an allegation of noncompliance with the registered order, or to contest a remedy being sought or the amount of an alleged arrearage as provided in section 625.
>
> (2) If the nonregistering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law. If a nonregistered party requests a hearing to contest the validity or enforcement of the registered order, the registering tribunal shall schedule the matter for hearing and give notice to the parties of the hearing date, time, and place.

Therefore, if a party fails to request a hearing on a registered order within 20 days after the date of mailing or personal service of notice of the registration, "the order is confirmed by operation of law." MCL 552.1623(2). And, as noted above, after an order has been confirmed, a defense that could have been raised, such as the statute of limitations defense, is precluded. MCL 552.1625(3).

The registration statement for the support orders in this case was filed on or around October 15, 2007. The order was mailed to defendant on December 14, 2007. At a show cause hearing held on October 15, 2008, defendant's then-appointed counsel informed the hearing referee that defendant was contesting the amount of the support order, but beyond that, "[he had] really nothing further to contest." Defendant first appears to have filed any type of challenge to the enforcement of the support orders in April of 2009 when he responded to a show cause order and filed a motion to terminate his payment obligation. Defendant did not raise his statute of limitations defense at this time, and instead waited until May 14, 2009, to raise the defense for the first time. Consequently, defendant neither challenged the support orders nor raised his statute of limitations defense within 20 days of receiving notice. Accordingly, defendant was precluded from raising his statute of limitations defense because he failed to timely assert the defense as required under the UIFSA. See MCL 552.1625(3). Although the circuit court found waiver on different grounds, we nevertheless affirm the circuit court's finding of waiver. *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001) (quotation omitted; alteration in original) ("[w]hen this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning.").

In reaching this conclusion, we reject defendant's argument that we should decline to find waiver simply because the circuit court, in its June 2, 2009 order, ordered the referee to consider defendant's statute of limitations argument, which had not previously been decided. Defendant cites no authority to support his position that the issue was not waived by virtue of the circuit court requiring the referee to consider the matter. "It is not enough for an appellant to simply announce a position or assert an error in his or her brief and then leave it up to this Court to discover and rationalize the basis for the claims . . . ." *DeGeorge v Warheit*, 276 Mich App 587, 594; 741 NW2d 384 (2007). Further, we do not construe the circuit court's order for the referee to consider defendant's statute of limitations defense as a determination that the statute of limitations defense had not been waived. Rather, the circuit court correctly recognized that defendant's statute of limitations defense, which was newly asserted, had not yet been decided.

Additionally, we reject defendant's argument that we should decline to find waiver of the statute of limitations defense because "simply equity" and the policy of statute of limitations defenses demand otherwise. Defendant correctly recognizes that "[t]he policy reasons behind statutes of limitations include: the prompt recovery of damages, penalizing of plaintiffs who are not industrious in pursuing claims, security against stale demands, relieving defendants' fear of litigation, prevention of fraudulent claims, and a remedy for general inconveniences resulting from delay." *Nielsen v Barnett*, 440 Mich 1, 8-9; 485 NW2d 666 (1992). However, the policy rationale behind requiring a party to timely assert affirmative defenses is to prevent the adverse party from being unfairly surprised. See *Horvath v Delida*, 213 Mich App 620, 630; 540 NW2d 760 (1995). Therefore, there is a policy rationale supporting the finding waiver in this case. Further, defendant cites no authority as to why we should excuse his approximately two-year

delay in raising a statute of limitations defense, and we find no reason to excuse his failure to timely assert the defense.

B. RENEWAL OF THE PROMISE TO PAY

Additionally, assuming without deciding that the applicable limitations period expired in this case, and regardless of whether defendant waived his statute of limitations defense by failing to timely assert it, we find that defendant revived the limitations period when he made payments on his support obligations in 2008. It is undisputed that defendant made three partial payments on his support obligations: (1) a $1,325.25 payment on May 18, 2008 in order to avoid a 45-day jail sentence; (2) a $1,326.25 payment on June 5, 2008; and (3) a payment of $1,326.25 on July 21, 2008. When a party makes partial payment on a debt after the expiration of the applicable statute of limitations, those partial payments can serve as an acknowledgment of the debt and a waiver of a statute of limitations defense. *Wayne Co Social Servs Dir v Yates*, 261 Mich App 152, 156; 681 NW2d 5 (2004); *Alpena Friend of the Court ex rel Paul v Durecki*, 195 Mich App 635, 638; 491 NW2d 864 (1992). As explained by our Supreme Court in *Yeiter v Knights of St Casimir Aid Society*, 461 Mich 493, 497; 607 NW2d 68 (2000), a "partial payment restarts the running of the limitation period unless it is accompanied by a declaration or circumstance that rebuts the implication that the debtor by partial payment admits the full obligation." This is because a partial payment, unless accompanied by a showing that the payment was not intended to be a new promise, is equivalent to a new promise to pay the debt; such a promise is sufficient to toll the statute of limitations and to waive the debtor's use of the statute as a defense. *Id.* at 498-499.

Here, even if defendant did not waive his statute of limitations defense, he revived the limitations period by making partial payment on his support obligations. *Durecki*, 195 Mich App at 638-639. Contrary to defendant's contentions, the fact that these payments were made to avoid a jail sentence or finding of contempt does not render the payments involuntary, nor does it rebut the implication that the partial payments amounted to an admission of the full debt obligation. *Id.* In *Durecki*, this Court rejected the very arguments now raised by defendant. *Id.* We are bound by *Durecki*. MCR 7.215(J)(1).

Defendant acknowledges this Court's holding in *Durecki*, but argues that this Court should follow the approach taken by the panel in *Industrial Lease-Back Corp v Romulus Twp*, 23 Mich App 449; 178 NW2d 819 (1970). In that case, the panel opined:

> The generally prevailing rule that voluntary payment or performance of a judgment bars appellate challenge is well established in Michigan. It may be, however, that payment or performance following the invocation or threatened exercise of a court's contempt power should not be regarded as voluntary or as constituting a waiver of the right to challenge the court's order. [*Id.* at 452 (internal footnotes omitted).]

Defendant's reliance on *Industrial Lease-Back Corp* is misplaced. Initially, the statement quoted above from *Industrial Lease-Back Corp* is not binding because it a judicial comment that was unnecessary to the decision and therefore, is mere dictum. See *Carr v Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003). In *Industrial Lease-Back Corp*, 23 Mich App at 451,

this Court held that the defendant township's appeal of a circuit court order directing the township to issue building permits was moot. After concluding that it would not reach the merits of the defendant's appeal, the panel then opined that payment or performance following the threat of contempt proceedings might be involuntary. *Id.* at 452. Such an opinion was unnecessary to the panel's holding in that case and therefore, is non-binding dictum. See *Carr*, 259 Mich App at 383-384 (quotations omitted) ("dictum is a judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)."). Thus, we are not bound by the above-quoted passage from *Industrial Lease-Back. Id.* More importantly, even if the above-quoted passage of *Industrial Lease-Back Corp* is not dictum, this Court is bound to follow *Durecki* on this issue because, unlike *Industrial Lease-Back Corp*, it is a published decision issued after November 1, 1990. MCR 7.215(J)(1).

Affirmed.

/s/ David H. Sawyer
/s/ Stephen L. Borrello
/s/ Jane M. Beckering